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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1992

LUCILLE R. KAUFFMAN,

Petitioner,

vs.

ALLIED SIGNAL, INC., AUTOLITE DIVISION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What standard should be applied in federal courts under Title VII to determine when an employer will be held liable for hostile environment sexual harassment perpetrated by one of its supervisors upon a subordinate employee?

2. If a supervisor is found to be acting within the scope of employment when he sexually harasses a subordinate, must the employer always be required to have prior notice of the supervisor's harassment and be given the opportunity to take prompt and adequate remedial action before the employer will be held liable?

3. Should federal courts be allowed to apply a different standard for employer liability for sexual harassment perpetrated by one of its supervisors upon a subordinate employee than for race and other Title VII claims of discrimination?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Lucille R. Kauffman and the respondent Allied Signal, Inc., Autolite Division.

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No.

In The

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LUCILLE R. KAUFFMAN,

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vs.

ALLIED SIGNAL, INC., AUTOLITE DIVISION,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioner Lucille R. Kauffman respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on July 22, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, dated July 22, 1992, is reported at 970 F.2d 178, and is reprinted in the appendix hereto, p. 1a, *infra*.

The opinion and order of the United States District Court for the Northern District of Ohio Western Division (Walinski, D.J.), dated May 17, 1991, has not been reported. It is reprinted in the appendix hereto, p. 19a, *infra*.

STATEMENT OF JURISDICTION

The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*, and under 28 U.S.C. § 1331 (1958), *as amended by* Act of December 1, 1980 (general federal question jurisdiction). The District Court for the Northern District of Ohio Western Division granted respondent's motion for summary judgment. *See* p. 36a, *infra*.

On petitioner's appeal, the Sixth Circuit on July 22, 1992, entered a judgment and an opinion upholding the district court's order dismissing petitioner's hostile environment claim and state law claim for the intentional infliction of serious emotional distress and reversing the dismissal of petitioner's quid pro quo claim and directed a remand for further consideration on the *quid pro quo* claim consistent with the Sixth Circuit opinion. *See* p. 18a, *infra*. No petition for rehearing was sought by either party. Petitioner's writ is to appeal the Sixth Circuit decision regarding the hostile environment issue and corollary questions which arose as a result of the court's findings.

The jurisdiction of this Court to review the judgment of the

Sixth Circuit is invoked under 28 U.S.C. § 1254(1) (1948), *as amended by* Act of June 27, 1988.

STATUTE INVOLVED

42 U.S.C. § 2000e-2(a). *Unlawful employment practices.*

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

A. Facts

Petitioner, Lucille R. Kauffman ("Kauffman"), an employee of respondent, Allied Signal, Inc., Autolite Division ("Allied"), instituted this action against Allied for sexual harassment perpetrated upon her by her supervisor pursuant to Title VII, 42 U.S.C. § 2000e-2(a). Kauffman brought three claims: a "hostile environment" claim of sexual harassment under Title VII, a "*quid*

pro quo" claim of sexual harassment under Title VII,[1] and a state law claim under Ohio law for the intentional infliction of serious emotional distress.

The supervisor who committed the sexual harassment against Kauffman was Donald R. Butts ("Butts"). Butts had been employed by Allied for at least twenty years as a production supervisor until his retirement in 1986. In 1987, Butts returned to work as a temporary full time production supervisor pursuant to an agreement with a temporary service. Butts' duties included "assigning jobs, delegating work, analyzing problems, supervising the work force, transferring product from process to process, and reporting attendance." *See* p. 2a, *infra*. The parties are in dispute over whether Butts could discipline employees; Kauffman contended he did possess such authority, Allied denied any such authority claiming only the Employee Relations Department ("ERD") could hire, fire, or otherwise discipline. *See* p. 2a, *infra*.

The parties do not dispute the occurrence of sexual harassment. In early 1988, Kauffman took medical leave to have breast enlargement surgery in order to enhance her looks and self-esteem. Kauffman considered this a very private matter and told only a few close friends, including co-workers, about her surgery, in confidence. *See* p. 2a, *infra*. Kauffman did not tell Butts about her surgery. When Kauffman returned to work on April 11, 1988, Butts came up behind her machine, touched her left breast, and stated: "You didn't tell me you were going on medical leave. Why

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1. Case law recognizes two types of sexual harassment: (1) harassment that creates an offensive or hostile environment and (2) *quid pro quo* harassment, in which a supervisor demands sexual favors as a condition of job benefits. *See Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 618 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Yates v. Avco Corp.*, 819 F.2d 630, 634 (6th Cir. 1987). Under the "hostile environment" theory, there are two types of cases, those where the harasser is a co-worker and those where the harasser is a supervisor. In 1986, this Court held that a claim of hostile environment sexual harassment was actionable under Title VII. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

didn't you tell me you were getting new tits? When do I get to see them?" *See* p. 2a, *infra*. Butts also tried to look down Kauffman's shirt while Kauffman immediately pushed him away and said "That's enough Don." *See* p. 3a, *infra*.

The next day, April 12, 1988, Butts took Kauffman off her regular machine, no. 110, and assigned her to machine no. 108, a manual press that was disliked within the department because it created extra work and was difficult to operate. *See* p. 3a, *infra*. A co-worker, Joyce Cooper, testified on deposition that working on machine 108 was "torture", as it required more manual labor than any other machine and the operator constantly had to baby-sit it. *See* p. 3a, *infra*. When Cooper asked Butts why he had put Kauffman on machine no. 108 and if there was something wrong with Kauffman's regular machine, Butts responded that "No, there's nothing wrong with her machine, I put her on 108 for punishment because she wouldn't show me her tits". *See* p. 3a, *infra*.

On April 13, 1988, while Kauffman was again working at her regular machine, no. 110, Butts threw a spark plug insulator at her and hit her on the right hip. Butts also told employee William Barfield, in front of a co-worker, John McMeen, "If you get to see Lou's tits before I do I'll be pissed." *See* p. 3a, *infra*. That evening, Butts instructed another co-worker, R.T. Smith, to ask Kauffman, "to show you her tits." Smith did this, but apologized after Kauffman became hysterical and started crying. During this three-day period, Kauffman alleges that she was also approached by at least twenty other co-workers who made comments about her surgery. *See* p. 3a, *infra*.

On April 13, 1988, Kauffman went to her union representative who brought her complaint to the attention of Sam Harmon, Director of Employee Relations (DER). Butts was confronted with these allegations and was terminated immediately on April 14, 1988. *See* p. 3a, *infra*.

Allied has had a policy against sexual harassment since 1981. It urges employees to present complaints of sexual harassment to the management through the DER. There is also a grievance procedure available through the collective bargaining agreement However, neither Kauffman nor co-worker Barfield had ever seen this policy displayed on any bulletin boards or message centers. In fact, neither employee knew that Allied had a sexual harassment policy. *See* p. 4a, *infra.*

Taking the record in the light most favorable to the petitioner, the District Court stated that at the time of the harassment, none of Allied's top-level managers were aware of any specific procedure to handle such complaints and that there had not been any meetings in the last five years with either supervisory personnel or salaried employees on the subject. Until Kauffman complained to her union representative, Allied had received only one other complaint of sexual harassment by a supervisor. *See* p. 4a, *infra.*

As a result of these harassing incidents, Kauffman was forced to take a medical leave of absence and remained away from work until July 18, 1988. Kauffman claims that when she returned to work she met increased pressure and hostility, and that she developed fear as a result of her notoriety at the plant. Kauffman also testified that when she returned to work, she was placed on three different shifts and given several different job assignments that differed from those she had received before the harassment. *See* p. 4a, *infra.*

Kauffman was forced to take a second medical leave of absence in October 1988. During this leave, she suffered a nervous breakdown. Her psychiatrist testified that as a result of the sexual harassment in April 1988, Kauffman suffers a post-traumatic stress disorder. Kauffman is presently unable to return to work, based on her psychiatrist's recommendation. *See* p. 4-5a, *infra.*

Kauffman filed a claim with the Equal Employment Opportunity Commission (EEOC) and the Ohio Civil Rights Commission. Subsequent to the receipt of a right-to-sue letter, she filed the instant suit against Allied.

B. Lower Court Decisions

The district court, in granting Allied summary judgment, examined Allied's liability based upon the doctrine of respondeat superior. The court found that Allied was not liable under this doctrine because Allied had no knowledge of Butts' actions and had no reason to know of his actions because there had been no prior complaints against Butts; that Butts' harassment did not benefit Allied; that Allied had a written policy against sexual harassment; and that Allied took immediate and effective remedial action by discharging Butts. *See* p. 5a, *infra*. The district court also held that because Butts did not have the authority to hire, fire, promote, or discipline Kauffman on his own, and because Allied's policy worked in this case, Allied was not liable as a matter of law for Butts' harassment of Kauffman. *See* p. 5a, *infra*.

The district court also held that Kauffman did not suffer a tangible job detriment, as it held that a tangible job detriment must be economic in nature and Kauffman suffered no such economic detriment. *See* p. 15a, *infra*.

The District Court refused to exercise pendent jurisdiction over the state claim of intentional infliction of emotional distress arguing it was an issue of first impression that would be best settled by the Ohio courts. *See* p. 17a, *infra*.

The Sixth Circuit Court of Appeals, on review, ruled that the district court erred by applying the doctrine of *respondeat superior* to the hostile environment claim. The court ruled that in hostile environment actions, the doctrine of *respondeat superior* is

applicable only to *co-worker* harassment cases. *See* p. 8a, *infra*. In instances where the harasser is a *supervisor*, the Court of Appeals announced the standard as a "scope of employment" test based on broader agency principles. The court then went one step further and ruled that agency liability could be negated "if the employer respond[ed] adequately and effectively once it ha[d] *notice* of the actions." *See* p. 10a, *infra* (emphasis added).

The standard applied by the Sixth Circuit for whether Allied was liable for Butts' actions is (p. 11a, *infra*):

> 1) whether Butts's harassing actions were foreseeable or fell within his scope of employment and 2) even if they were, whether Allied responded adequately and effectively to negate liability.

See p. 11a, *infra*. While the Sixth Circuit determined Butts' actions were within the scope of his employment, it nonetheless held that Allied's response was prompt and adequate, and thus found no agency liability. *See* p. 11a, *infra*.

The court disagreed with the district court which held that since Butts did not have the ability to hire, fire, promote and discipline Kauffman on his own, Allied was not liable as Butts did not qualify as its agent under "scope of employment" standards. Rather, the Sixth Circuit held that a supervisor need not have ultimate authority to hire or fire to qualify as an "employer" under Title VII. The court ruled "[a]n individual qualifies as an 'employer' under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment." *See* p. 11-12a, *infra* (citing *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), *modified on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc)). Further, "[t]he supervising employee need not have ultimate

authority to hire or fire to qualify as an employer, so long as he or she has significant input into such personnel decisions." *See* p. 12a, *infra*. The court found Butts did not have ultimate authority to hire or fire, but he did have significant input in the process, and at the very least, a question of fact existed as to whether Butts had enough authority to qualify as an agent and therefore employer under Title VII. Additionally, the court held that Butts was acting in the scope of his employment when he committed the sexual harassment. *See* p. 12a, *infra*. Nevertheless, Allied was held not liable for Butts' actions because they responded adequately and effectively to eliminate the source of sexual harassment. *See* p. 12a, *infra*.

With respect to the *quid pro quo* claim, the court of appeals rejected the district court's position that a tangible job detriment must be economic in nature. *See* p. 16a, *infra*. The court cited *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777 (1st Cir. 1990) wherein the First Circuit adopted a broader notion of tangible job detriment, stating: "[i]t is the essence of *quid pro quo* harassment that the employee 'was subject[ed] to unwelcome sexual advances by a supervisor . . . and . . . her reaction to these advances affected tangible aspects of . . . her compensation, terms, conditions, or privileges of employment . . .' " *Id.* at 783 (citations omitted) (emphasis in original). *See* p. 16a, *infra*. The court remanded the issue to the district court to determine if a sufficient detriment had occurred when Kauffman was transferred to a different and more laborious machine for one day. *See* p. 16a, *infra*.

The court of appeals affirmed the district court's dismissal of Kauffman's state law claim of intentional infliction of emotional distress. The court ruled that the exercise of pendent jurisdiction is discretionary, and since the state law claim was an issue of first impression, and because of the complexity of the issue, it found the district court did not abuse its discretion in refusing to exercise pendant jurisdiction over the state law claim. *See* p. 18a, *infra*.

REASONS FOR GRANTING THE WRIT

I.

A UNIFORM STANDARD MUST BE DEVELOPED BY THIS COURT TO DETERMINE WHEN AN EMPLOYER WILL BE HELD LIABLE FOR HOSTILE ENVIRONMENT SEXUAL HARASSMENT PERPETRATED BY A SUPERVISOR AGAINST A SUBORDINATE EMPLOYEE BECAUSE THE STANDARDS OF PROOF DEVELOPED AMONGST THE FEDERAL CIRCUIT COURTS SINCE *MERITOR SAV. BANK, FSB V. VINSON*[2] ARE NOT UNIFORM.

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Congress defined "employer" as a "person engaged in an industry affecting commerce . . . *and any agent of such a person.*" 42 U.S.C. § 2000e(b) (emphasis added).

The circuit courts have interpreted Title VII to prohibit two types of sexual harassment: *quid pro quo* sexual harassment and hostile environment sexual harassment. *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 575 (10th Cir. 1990). *Quid pro quo* sexual harassment involves the conditioning of tangible employment benefits upon the submission to sexual conduct. *Id.* Hostile environment harassment occurs "where '[sexual] conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.' " *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (quoting 29 C.F.R. § 1604.11(a)(e)).

2. 477 U.S. 57 (1986).

This Court recognized that a claim of sexual harassment based on a "hostile environment" theory was actionable under Title VII in *Meritor Sav. Bank , FSB v.Vinson*, 477 U.S. 57 (1986). In *Vinson*, this Court had the opportunity to issue a definitive rule on employer liability for sexual harassment perbetrated by its supervisor, but declined to do so stating:

> We therefore decline the parties invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors.

477 U.S. at 72. While this Court overruled the imposition of blanket strict liability, a strict requirement of notice was also overruled: "[f]or the same reason, absence of notice to an employer does not necessarily insulate that employer from liability." *Id.* In addition, "the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure" does not necessarily shield the employer from liability. *Id.*

In response to *Vinson*, and in an attempt to delineate a standard of employer liability for hostile environment sexual harassment

perpetrated by a supervisor upon a subordinate employee, the circuit courts have admittedly had a difficult time defining a uniform standard. *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989). A review of these differing standards below demonstrates the glaring need for this Court to announce a uniform rule on the issue of employer liability for hostile environment sexual discrimination perpetrated by a supervisor.

A. "Scope of Employment Standard With Notice Requirement"

In the case that petitioner requests this Court to review, the Sixth Circuit, in rejecting *respondeat superior*, holds an employer liable for hostile environment sexual harassment perpetrated by a supervisor when: (1) the supervisor's actions were foreseeable or fell within the scope of employment *and* (2) even if they were, whether the employer responded adequately and effectively to negate liability. *Kauffman v. Allied Signal, Inc., Autolite Division*, 970 F.2d 178, 184 (6th Cir. 1992) (reprinted in the appendix hereto, p. 1a, *infra*). This standard, in effect, necessitates notice before an employer will be liable for hostile environment sexual harassment perpetrated by a supervisor by emphasizing foreseeability and absolution upon remedial action. The Sixth Circuit's standard is in direct conflict with other standards developed by the federal circuits.

B. *Respondeat Superior*: "Knew or Should Have Known Standard."

The most prevalent standard, adopted by the First, Third, Fifth, Eighth, and Ninth Circuits, for when an employer will be liable for a supervisor's sexual harassment of a subordinate employee is *respondeat superior*. Under this standard, "liability exists where the [employer] knew or should have known of the harassment and failed to take prompt remedial action." *Andrews v.*

City of Philadelphia, 895 F.2d 1469, 1486 (3rd Cir. 1990) (citations omitted); *accord, Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988); *Jones v. Flagship Int'l*, 793 F.2d 714, 720 (5th Cir. 1986); *Hall v. Gus Const. Co., Inc.*, 842 F.2d 1010, 1015 (8th Cir. 1988); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1515-1516 (9th Cir. 1988).

C. "Sufficiently High Level in the Hierarchy."

The Second Circuit holds an employer directly liable for hostile environment sexual harassment perpetrated by a supervisor when "a supervisor at a sufficiently high level in the hierarchy" commits the harassment. *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59, 64 (2d Cir. 1992). When the supervisor is not at a sufficiently high level in the hierarchy, the employer will be liable when "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." *Id.* at 63.

D. "Some Basis Exists for Imputing Liability to the Employer."

The Fourth Circuit holds an employer liable for a supervisor's sexual harassment of a subordinate employee when "some basis exists for imputing liability to the employer." *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989); *accord, Swentek v. USAIR, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987).

E. "Strict Liability With Requisite Agency Authority."

The Seventh Circuit, applying a totally different standard, holds an employer strictly liable for hostile environment sexual discrimination perpetrated by a supervisor when the supervisor possessed and exercised the requisite agency authority to hire, fire, or otherwise discipline the victim. *North v. Madison Area Ass'n for*

Retarded Citizens, 844 F.2d 401, 407 (7th Cir. 1988). In the absence of such authority, the employer will be liable only if "it knew or should have known of those actions and failed to take reasonable remedial measures." *Id.*

F. "*Restatement (Second) of Agency* § 219 Standard."

The Tenth Circuit applies the *Restatement (Second) of Agency* § 219 (1958) for when an employer will be liable for hostile environment sexual harassment perpetrated by a supervisor. Under this standard the employer is liable when the supervisor acted within the scope of his/her employment. Restatement (Second) of Agency § 219(1). The employer is also held liable when the supervisor acted outside the scope of his/her employment if the employer was negligent or reckless or if the supervisor exercised apparent authority or was aided by the existence of the agency relationship in accomplishing the sexual harassment. Restatement (Second) of Agency § 219(2)(a-d); *Hirschfeld v. New Mexico Corrections Department*, 916 F.2d 572, 576 (10th Cir. 1990).

G. "Strict Liability for Dual Hostile Environment-*Quid Pro Quo* Claims."

The Eleventh Circuit Court of Appeals holds an employer directly liable for hostile environment sexual harassment perpetrated by a supervisor when there is proof of actionable hostile environment and *quid pro quo* claims within the same set of operative facts. *Steele v. Offshore Shipbuilding*, 867 F.2d 1311, 1317 (11th Cir. 1989); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1560 n. 9 (11th Cir. 1987). In the absence of facts establishing *quid pro quo* harassment, the Eleventh Circuit will hold an employer liable through the doctrine of *respondeat superior* (*i.e.*, "knew or should have known and failed to take

prompt remedial action). *Steele*, 867 F.2d at 1317.

H. "Direct Liability Under Title VII."

The D.C. Circuit has not ruled on the matter since *Vinson*. The D.C. Circuit will hold an employer liable "for [the] sexual harassment of any subordinate by *any* supervising superior." *Vinson v. Taylor*, 753 F.2d 141, 150 (D.C. Cir. 1985), *aff'd*, 477 U.S. 57 (1986) (emphasis added). Liability will attach even though the supervisor did not exercise plenary authority, and regardless of notice. *Id.* at 151-152.

It is painfully apparent the circuit courts have interpreted *Vinson's* mandate ubiquitously and too narrowly under the "knew or should have known" standard and the Sixth Circuit's "scope of employment" standard. These standards are not supported by this Court's ruling in *Vinson*.

This Court in *Vinson* ruled that employers are not "always automatically liable for sexual harassment by their supervisors." *Vinson*, 477 U.S. at 72. However, this Court also ruled that the "absence of notice to an employer does not necessarily insulate [the] employer from liability." *Id.* The First, Third, Fifth, Sixth, Eighth, and Ninth Circuits have interpreted this Court's ruling to mean the employer can *never* be directly liable for hostile environment sexual harassment perpetrated by a supervisor and have even gone so far as to require notice before any liability will attach to the employer. *Lipsett*, 864 F.2d at 901 (1st Cir.); *Andrews*, 895 F.2d at 1486 (3rd Cir.); *Jones*; 793 F.2d at 720 (5th Cir.); *Kauffman*, 970 F.2d at 184 (6th Cir.); *Gus Const.*, 842 F.2d at 1015 (8th Cir.); *Hacienda Hotel*, 881 F.2d at 1515-1516 (9th Cir.).

Although the lower courts were directed to make the determination of employer liability for sexual harassment perpetrated by supervisors based on agency principles, *Vinson*, 477

U.S. at 72, the progeny of *Vinson* has been the development of a variety of standards that are unduly harsh to victims of sexual harassment and not in conformity with general agency principles.

The necessity for review is exacerbated by numerous sources of authority, all of which have been relied on by the circuits, that support one particular standard over another.

The EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1985), have been interpreted to create strict liability for hostile environment sexual discrimination perpetrated by supervisors. *Vinson*, 477 U.S. at 2409 (Marshall, J., concurring). The guidelines, "which are entitled to great deference", *id.*, provide:

> Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and *regardless of whether the employer knew or should have known of their occurrence*. The Commission will examine the circumstances of the particular employment relationship and the job [f]unctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

29 C.F.R. § 1604.11 (1985) (emphasis added).

Title VII, 42 U.S.C. § 2000e(b) defines "employer" expansively to include agents of the employer. This broad definition, it has been argued, evinces a congressional intent to hold an employer directly liable for a supervisor's discrimination. *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989). The Eleventh Circuit adopted this rationale in part holding the employer strictly liable for hostile environment sexual discrimination perpetrated by a supervisor when both a claim of hostile environment and *quid pro quo* discrimination are interposed. *Id; see also, Sparks*, 830 F.2d at 1560 n. 9.

The *Restatement (Second) of Agency* (1958) provides the proper basis for review of the scope of employer liability. Under the *Restatement*, a master is liable for his servant when the servant is acting within the scope of his employment. *Restatement (Second) of Agency* § 219(1). The employer is also liable in limited situations when the servant is acting outside the scope of employment. A master is liable for the servant acting outside the scope of employment when: (a) the master intended the conduct or the consequences, (b) the master was negligent or reckless, (c) the servant's conduct violated a non-delegable duty of the master, and (d) when the servant acted with apparent authority or was aided in accomplishing the tort by the existence of the agency relationship. *Id.* § 219(2)(a-d); *see also, North v. Madison Area Ass'n for Retarded Citizens*, 844 F.2d 401, 407 (7th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418 (10th Cir. 1987). There is no post-incident notice requirement under the *Restatement* or under any other principles of common law which would negate an employer's liability for a supervisor's sexual harassment of a subordinate.

With the varying standards adopted by the circuit courts, it is imperative for this Court to revisit *Vinson* and issue a more cohesive rule on employer liability for hostile environment sexual harassment perpetrated by a supervisor. The conflict among the circuits causes victims of discrimination in one circuit to receive

different treatment legally than those in others. A uniform standard must be developed by this Court.

II.

A UNIFORM STANDARD DEVELOPED BY THIS COURT WILL PROTECT VICTIMS OF SEXUAL HARASSMENT FROM JUDICIALLY CONSTRUCTED BARRIERS DEVELOPED BY THE CIRCUIT COURTS THAT FAIL TO CONSIDER THE MANDATES OF THIS COURT'S DECISION IN *MERITOR SAV. BANK, FSB V. VINSON*.

As a result of the Sixth Circuit's decision in *Kauffman* and those in other circuits, a plaintiff who alleges hostile environment sexual discrimination now faces judicially constructed barriers such as notice, even when the supervisor is found to have been acting within the scope of his employment, before the employer will be held liable for the discrimination perpetrated by one of its supervisors. *E.g.*, *Kauffman*, 970 F.2d at 184 (employer absolved of all liability if after receiving notice, it responds promptly and adequately). Petitioner argues this was not the mandate this Court envisioned in its decision in *Vinson*.

A. Notice

The most prevalent standard of employer liability for hostile environment sexual discrimination perpetrated by supervisors is the "knew or should have known" standard adopted by the First, Third, Fifth, Eighth, and Ninth Circuits. *Andrews*, 895 F.2d at 1486 (3rd Cir. 1990); *Lipsett*, 864 F.2d at 901 (1st Cir. 1988); *Jones*; 793 F.2d at 720 (5th Cir. 1986); *Swentek*, 830 F.2d 552 (4th Cir. 1987); *Gus Const.*, 842 F.2d at 1015 (8th Cir. 1988); *Hacienda Hotel*, 881 F.2d at 1515-1516 (9th Cir. 1988). This standard contravenes this Court's ruling in *Vinson* which provides the

"absence of notice to an employer does not necessarily insulate that employer from liability." 477 U.S. at 72. Although this Court has ruled the employer is not *always* automatically liable for hostile environment sexual discrimination perpetrated by a supervisor, petitioner does not interpret *Vinson* to mean the employer will *never* be automatically or directly liable. Such an intent is obvious from the abrogation of a notice requirement in all instances. This Court, rather, ruled the determination of employer liability should be based in agency principles. *Vinson*, 477 U.S. at 72.

Under agency law, a master, through no direct fault of its own, is held vicariously liable for the harmful conduct of its servants acting within the scope of employment. *Restatement (Second) of Agency* § 219(1)(1958); Katherine S. Anderson, Note, *Employer Liability Under Title VII for Sexual Harassment After Meritor Savings Bank v. Vinson*, 87 Colum. L. R. 1258, 1271 (1987); W. Page Keeton *et al., Prosser and Keeton on the Law of Torts* § 69 (5th ed. 1984). In *Kauffman*, the Sixth Circuit indeed found Butts to have been acting within the scope of his employment when he sexually harassed Kauffman, but still held that Allied must have had notice before they could be held liable. The Sixth Circuit held "[t]he essential question in applying agency principles is whether the act complained of took place in the scope of the agent's employment." *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987). Yet, while the Sixth Circuit's characterization of agency principles in *Kauffman* is couched in a "scope of employment" analysis, it is myopic and does not comply with agency principles given the imposition of a notice requirement.

Under agency principles, notice is not required to impose liability on an employer. Under the *Restatement (Second) of Agency*, the scope of the supervisor's actual and/or apparent authority is at the crux of determining whether the employer is directly liable for the acts of its supervisors. *See Sparks*, 830 F.2d

at 1559 (11th Cir. 1987).

Courts have also readily found that employers are directly liable for the acts of their supervisors under *Restatement (Second) of Agency* § 219(2)(d) due to the nature of the statutory scheme under Title VII which broadly defines "employer" to include "any agent of such person", and which is intended to effectuate the remedial and public policy goals of the Civil Rights Act of 1964. 42 U.S.C. § 2000e(b); *Spencer*, 894 F.2d at 657.

It is axiomatic that an employer can act only through individual supervisors and employees. *Id.*; *Vinson*, 477 U.S. at 75 (Marshall, J., concurring). Requiring the employer to always have notice before it can be held liable for hostile environment sexual discrimination perpetrated by a supervisor, as held in *Kauffman*, frustrates the agency relationship and the intent of Title VII. *See generally, Meritor*, 477 U.S. at 72; *Spencer*, 894 F.2d at 657.

The Court of Appeals in the Seventh, Tenth, and Eleventh Circuits correctly recognize that the determination of employer liability after this Court's ruling in *Vinson* should be based on the *Restatement (Second) of Agency* § 219 (1958). *Madison Area Ass'n*, 844 F.2d at 407; *Hicks*, 833 F.2d at 1417-1418; *Sparks*, 830 F.2d at 1559. Other circuits, including the Sixth in *Kauffman*, by requiring notice to an employer for a supervisor's harassment, have created an almost insurmountable additional barrier that a victim of sexual discrimination must overcome which is as harsh as the standard imposed on an employer for sexual harassment between co-workers which uniformly requires notice before the employer can be held liable. *E.g., Kauffman*, 970 F.2d at 183. This is surely wrong and not the law under *Vinson* which abrogated such a notice requirement. 477 U.S. at 72.

B. Prompt and Adequate Remedial Action

The "scope of employment" standard, adopted by the Sixth

Circuit, also allows an employer to escape liability if it responds to a complaint promptly and adequately without requiring an employer to act prudently and responsibly to *prevent* sexual harassment. *Kauffman v. Allied Signal*, 970 F.2d at 184. If all the employer need do is simply terminate a supervisor after a complaint is lodged, as was the case in *Kauffman*, the employer is provided with no impetus at all to take steps necessary to eliminate the prevalence of sexual harassment in the workplace; all it merely has to show is that it lacked knowledge. If the goal of eradicating sexual harassment in the workplace is ever to be achieved, a greater duty must be placed on employers. As stated by the EEOC:

> Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f). Thus, it is imperative that a duty of the highest regard be placed on the employer to insure that an effective policy is promulgated and distributed to all employees. The employees should be made aware of the existence of the policy, its procedures, and the employer's intolerance for sexual discrimination; such was not the case in *Kauffman*. 970 F.2d at 184. *See Hirschfeld*, 916 F.2d at 577.

In the instant case, Allied should not be absolved of liability merely because it terminated Butts after Kauffman filed the complaint. Rather, Allied should be liable because it failed to take good-faith and prudent steps to *prevent* sexual discrimination in

the workplace. While Allied did promulgate a policy against sexual discrimination, neither Kauffman nor co-worker Barfield were aware of the policy. In addition, none of Allied's top-level managers were aware of any specific procedures to handle sexual harassment complaints, and no meetings were held in the last five years with either supervisory or salaried personnel on sexual harassment.

Allied had received only one other complaint of sexual harassment by a supervisor in the plant. It was argued by petitioner that employees may not have come forward in the past with complaints of sexual harassment because they were not aware of the company's policy. If Allied would have acted earlier to prevent sexual discrimination, it is possible Butts would never have committed the harassment out of fear of being disciplined by Allied for such conduct. Allied should not be absolved of liability simply because Butts was terminated; Allied's liability is properly based in negligence under the *Restatement (Second) of Agency* § 219(2)(b) because it failed to implement an effective policy to prevent sexual discrimination by its supervisors. Certainly, enough evidence was produced by the petitioner to create a genuine issue of material fact on this issue.

The current state of the law amongst the twelve circuits applies with mixed force depending on one's geographic location. A uniform rule of law, promulgated by this Court, will provide the needed guidance amongst the web of confusion that has succeeded *Vinson* and define explicitly the duty placed on the employer for sexual discrimination perpetrated by its supervisors.

III.

THIS COURT SHOULD DEVELOP A UNIFORM STANDARD OF LIABILITY AGAINST EMPLOYERS FOR HOSTILE ENVIRONMENT DISCRIMINATION PERPETRATED BY SUPERVISORS TOWARD SUBORDINATE EMPLOYEES THAT IS CONSISTENT WITH OTHER TYPES OF TITLE VII ACTIONS.

While this Court has not directly ruled on this issue, the federal circuit courts have uniformly held, pre-*Vinson*, employer's directly liable for hostile environment discrimination perpetrated by supervisors who have the authority to make employment decisions in every Title VII context except sexual discrimination. *Young v. S.W. Sav. & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975) (religious discrimination); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977) (race discrimination); *EEOC v. Univ. of New Mexico, Albuquerque*, 504 F.2d 1296, 1302 (10th Cir. 1974) (national origin discrimination); *accord, Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F.2d 599, 605 (7th Cir. 1985). The inconsistency created by applying a different standard for sexual harassment has no basis in modern society, and is inimical to the public policy goals of Title VII. *Vinson*, 753 F.2d at 151-152. As stated by the court in *Duke Homes*, "[a] different rule for sex discrimination would be contrary to Congress' finding that 'discrimination against women is no less serious than other prohibited forms of discrimination.'" 755 F.2d at 606 (citing S. Rep. No. 92-415, 92nd Cong., 1st Sess. 7 (1971); *see also,* H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 5 (1971), *reprinted in* U.S. Code Cong. & Ad. News 2137, 2141 (1972).

In all other Title VII contexts, save sexual harassment, courts do not consider intervening factors as barriers to employer liability for a supervisor's acts of discrimination. *See generally, Watson v. Fort Worth Bank and Trust*, 487 U.S. 978, 990-991 (1988);

Kathleen A. Smith, Note, *Employer Liability for Sexual Harassment: Inconsistency Under Title VII*, 37 Cath. U.L. Rev. 245, 263 (1987). Rather, "[t]he courts simply hold employers vicariously liable if a supervisor discriminated against an employee under his authority." *Id.*

The policy for holding employers directly liable for race, religious, and national origin discrimination perpetrated by a supervisor who has the authority to make employment decisions is based in agency principles. *Duke Homes*, 735 F.2d at 605. The company is a legal entity; it can act only through its duly appointed agents or managers. *Id.* Where the supervisor is given the authority to make employment decisions, and uses the authority which has been reposed in him, the supervisor is "for all intents and purposes, the Company." *Id.* The employer, therefore, must accept responsibility for the actions of its duly authorized supervisors. Furthermore, the employer is better suited to bear the costs of the torts of its employees than the innocent plaintiff. *Id.* These costs have been considered a cost of doing business and be avoided by the company more efficiently than by the injured plaintiff. *E.g. Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968) (Friendly, J.); *see generally* ,W. Page Keeton *et al., Prosser and Keeton on the Law of Torts* § 69 (5th ed. 1984); Guido Calebresi, Comment, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499, 543-545 (1961). In *Kauffman*, the court held that the supervisor acted in the scope of his employment with the requisite authority, yet, did not impute liability to the employer.

This Court should rule, with admonishment, that sexual harassment is no different from other Title VII actions, and create consistency under Title VII by developing a standard of employer liability that applies to all Title VII discrimination regardless of the protected class.

CONCLUSION

Sexual harassment has been characterized as "the most widespread problem women face in the workforce" experienced by 40-90% of American women depending on the survey[3]. It is imperative for this Court to issue a uniform rule of law for when an employer will be liable for hostile environment sexual harassment perpetrated by a supervisor against a subordinate. This will not only delineate the parameters of employer liability, but also provide victims with necessary protection from unduly harsh standards that require notice before liability attaches. A uniform standard will define the nature of the employer's duty and resolve the numerous conflicts between the circuits exacerbated by the existence of contradictory authority, and create much needed uniformity under Title VII.

Respectfully submitted,

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Counsel of Record
DeNUNE & KILLAM,
Attorneys for Petitioner

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3. *Women in the Work Force: Supreme Court Issues: Hearing before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 99th Cong., 2nd Sess. 87 (1986)(testimony of Sarah E. Burns, Assistant Director of the Georgetown University Law Center Sex Discrimination Clinic).

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JULY 27, 1992

No. 91-3511

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LUCILLE R. KAUFFMAN,
Plaintiff-Appellant,

v.

ALLIED SIGNAL, INC.,
AUTOLITE DIVISION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio

Decided and Filed July 22, 1991

Before: BOGGS and NORRIS, Circuit Judges; and BERTELSMAN, Chief District Judge.*

BOGGS, Circuit Judge. This is a sexual harassment case involving a supervisor in which a female employee seeks damages under Title VII, 42 U.S.C. §§ 2000(e) *et seq.*, against her employer under a "hostile environment theory" and a "quid pro quo theory." She also brought a state law claim under Ohio law for intentional infliction of serious emotional distress. The district court granted

*The Honorable William O. Bertelsman, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

summary judgment for the employer. We affirm in part and reverse in part.

I

Plaintiff Lucille R. Kauffman has been employed as a machine operator for the past fourteen years by defendant Allied Signal, Inc., Autolite Division, at its Fostoria, Ohio plant. Donald R. Butts had been employed by Allied for at least twenty years as a production supervisor until he retired in 1986. In 1987, Butts came back to work for Allied as a temporary full-time production supervisor pursuant to an agreement with the Rumpf Corporation, a temporary employment service.

Butts's duties as a production supervisor included assigning jobs, delegating work, analyzing problems, supervising the work force, transferring product from process to process, and reporting attendance. Plaintiff contends that Butts could discipline employees, which included firing and hiring in conjunction with his immediate supervisor, the Employee Relations Department ("ERD"), and the Union. Allied maintains that Butts had no individual power to fire or hire employees, as all such decisions had to go through the ERD. Only the ERD is authorized to hire and fire, and Allied argues that as a supervisor, Butts did not have the power to hire, fire, promote, or discipline employees on his own.

In early 1988, Kauffman took medical leave to have breast enlargement surgery in order to enhance her looks and self-esteem. Kauffman considered this a very private matter and told only a few close friends, including co-workers, about her surgery, in confidence. Kauffman did not tell Butts about her surgery. However, when Kauffman returned to work on April 11, 1988, Butts came up behind her machine, touched her left breast, and stated to Kauffman, "You didn't tell me you were going on

medical leave. Why didn't you tell me you were getting new tits? When do I get to see them?" Butts also tried to look down Kauffman's shirt, while Kauffman immediately pushed him away and said "That's enough Don."

The next day, April 12, 1988, Butts took Kauffman off her regular machine, No. 110, and assigned her to machine No. 108, a manual press that was disliked within the department because it created extra work and was difficult to operate. A co-worker, Joyce Cooper, testified on deposition that working with No. 108 was "torture," as it required more manual labor than any other machine and the operator constantly had to baby-sit it. When Cooper asked Butts why he had put Kauffman on machine No. 108 and if there was something wrong with Kauffman's regular machine, Butts responded that "No, there's nothing wrong with her machine, I put her on 108 for punishment because she wouldn't show me her tits."

On April 13, 1988, while Kauffman was again working at her regular machine, No. 110, Butts threw a spark plug insulator at her and hit her on the right hip. Butts also told employee William Barfield, in front of a co-worker, John McMeen, "If you get to see Lou's tits before I do I'll be pissed." That evening, Butts instructed another co-worker, R.T. Smith, a millwright, to ask Kauffman, "to show you her tits." Smith did this, but apologized after Kauffman became hysterical and started crying. During this three-day period, Kauffman alleges that she was also approached by at least twenty other co-workers who made comments about her surgery.

On April 13, 1988, Kauffman went to her union representative, who brought her complaint to the attention of Sam Harmon, Director of Employee Relations (DER). Butts was confronted with these allegations and was terminated immediately, on April 14, 1988. Allied has had a written policy against sexual harassment since 1981. It urges employees to present complaints of sexual harassment to the management through the DER. There

is also a grievance procedure available through the collective bargaining agreement. Allied testified that the company's policy was posted throughout the plant and that it was also the subject of "special" meetings with supervisors before 1986 and was discussed thereafter with supervisors on many occasions. However, neither plaintiff nor co-worker Barfield had ever seen this policy displayed on any bulletin boards or message centers within the plant. In fact, neither employee knew that Allied had a sexual harassment policy.

Taking the record in the light most favorable to the plaintiff, the district court stated that at the time of the harassment, none of Allied's top-level managers were ever aware of any specific procedure to handle such complaints and that there had not been any meetings in the last five years with either supervisory personnel or salaried employees on the subject. Until Kauffman complained to her union representative, Allied had received only one other complaint of sexual harassment by a supervisor.

As a result of these harassing incidents, Kauffman was forced to take a medical leave of absence, and remained away from work until July 18, 1988. Kauffman claims that when she returned to work she met increased pressure and hostility, and that she developed fear as a result of her notoriety at the plant. Kauffman also testified that when she returned to work, she was placed on three different shifts and given several different job assignments that differed from those she had received before the harassment.

Kauffman was forced to take a second medical leave of absence in October 1988. During this leave, she suffered a nervous breakdown. Her psychiatrist testified that as a result of the sexual harassment in April 1988, Kauffman suffers a post-traumatic stress disorder. Kauffman is presently unable to return to work, based on her psychiatrist's recommendation. Kauffman also testified

that she fears returning to work due to threats which she has received or been made aware of through various employees and agents working at Allied.[1]

Kauffman originally filed a claim with the Equal Employment Opportunity Commission (EEOC) and the Ohio Civil Rights Commission. After receiving a right-to-sue letter from the EEOC, she filed this lawsuit against Allied. The district court granted summary judgment for Allied and plaintiff appeals.

II

The question before us is whether a genuine issue of material fact exists as to whether Allied should be held liable for sexual harassment by one of its supervisors. The district court, in granting Allied summary judgment, examined Allied's liability based upon the doctrine of respondeat superior. The court found that Allied was not liable under this doctrine because Allied had no knowledge of Butts's actions and had no reason to know of these actions because there had been no prior complaints against Butts; that Butts's harassment did not benefit Allied; that Allied had a written policy against sexual harassment; and that Allied took immediate and effective remedial action by discharging Butts. The district court also held that because Butts did not have the authority to hire, fire, promote or discipline Kauffman on his own, and because Allied's policy worked in this case, Allied was not liable as a matter of law for Butts's harassment of Kauffman.

This court reviews grants of summary judgment *de novo* and it applies the same test as used by the district court. *See EEOC v. University of Detroit*, 904 F.2d 331, 334

[1]However, Allied points out that in 1986, some two years before the sexual harassment incident, Kauffman was diagnosed as having a mental disorder that results in emotional mood swings and heightened emotional sensitivity.

(6th Cir. 1990). Under Rule 56(c), Fed. R. Civ. P., summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 601 (6th Cir. 1988).

The moving party need not support its motion with affidavits or other similar materials "*negating*" the opponent's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (emphasis in original). "[T]he burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. The summary judgment standard requires a determination of whether the party bearing the burden of proof has presented a jury question as to each element of its case. *Id.* at 322; *Taylor v. Medtronics, Inc.*, 861 F.2d 980, 987 (6th Cir. 1988). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Accordingly, viewing the evidence in the light most favorable to the nonmoving party, the court should determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

Kauffman's sexual harassment claim arises from Title VII's proscription that "it shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national

origin . . . ." 42 U.S.C. § 2000e-2(a)(1). Case law recognizes two types of sexual harassment: 1) harassment that creates an offensive or hostile environment; and 2) quid quo pro harassment, in which a supervisor demands sexual favors as a condition for job benefits. *See Rabidue v. Osceola Refining Co.*, 805 F. 2d 611, 618 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Yates v. Avco Corp.*, 819 F. 2d 630, 634 (6th Cir. 1987).

In this case, where it is not contested that the sexual harassment occurred, the only question is whether Allied should be liable for the acts of its supervisor. Under the "hostile environment" theory, there are two types of cases, those where the harasser is a co-worker and those where the harasser is a supervisor. In 1986, the Supreme Court held that a claim of hostile environment sex discrimination was actionable under Title VII in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). The court, looking to EEOC Guidelines, held that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult" and "that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive working environment." *Vinson* 477 U.S. at 65.

While the Supreme Court refused "to issue a definitive rule on employer liability" it agreed

> with the EEOC that Congress wanted the courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.

Vinson, 477 U.S. at 72. The Supreme Court therefore rejected the notion that "employers are always automatically liable for sexual harassment by their supervisors." *Ibid.* Yet, in rejecting strict liability, *Vinson* does not reject all liability against the employer. Instead, it directed courts to base liability determinations on agency principles.

In *Rabidue*, this court, applying agency principles in a co-worker discrimination case, held that a plaintiff, to prevail in a hostile environment action, must assert and prove that:

> 1) the employee was a member of a protected class; 2) the employee was subjected to unwelcomed sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; 3) the harassment complained of was based upon sex; 4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psycho logical [sic] well-being of the plaintiff; and 5) the existence of respondeat superior liability.

Rabidue, 805 F. 2d at 619-20.

To establish respondeat superior liability, the plaintiff must prove "that the employer, through its agents or supervisory personnel, knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action." *Rabidue*, 805 F. 2d at 621. However, the court makes clear that this "knew or should have known" standard applies to only co-worker harassment cases.

The *Rabidue* court acknowledged the *Vinson* mandate

that courts look to common law principles of agency for guidance in determining liability from acts arising from supervisors and explicitly "expresse[d] no view as to the scope of respondeat superior liability in the context of a charge of a sexually hostile working environment where alleged acts of harassment by a plaintiff's supervisor are at issue and not, as here, the alleged acts of a peer in the work-place." *Rabidue*, 805 F. 2d at 621 n.6.

This circuit first addressed the standard of liability for hostile environment claims of sexual harassment caused by the acts of a supervisor in *Yates v. Avco Corp.*, 819 F. 2d 630 (6th Cir. 1987). The court upheld liability on the basis of traditional agency principles, in accordance with *Vinson*.

> The essential question in applying agency principles is whether the act complained of took place in the scope of the agent's employment. This determination requires an examination of such factors as *when* the act took place, *where* it took place, and whether it was *foreseeable*.

Yates, 819 F.2d at 636 (emphasis in original)(citations omitted). This "scope of employment" standard for supervisors is distinguishable from the "knew or should have known" respondeat superior standard for co-worker harassment cases.

The district court and parties seem to discuss Allied's liability interchangeably under respondeat superior and general agency principles. However, use of the phrase "respondeat superior" is typically associated with the co-worker "knew or should have known" standard. A different but closely related standard of general agency applies in supervisor harassment cases. We reject the appellee's argument that respondeat superior liability should apply here; this argument implies that we should apply a standard designed for co-worker cases, which

makes no sense in a case involving a supervisor. It is more accurate to discuss supervisor liability under the different general agency elements outlined in *Yates*.

As the appellant argues, the *Yates* standard is not the respondeat superior standard used by the court and appellee. *Sparks v. Pilot Freight Carriers, Inc.*, 830 F. 2d 1554 (11th Cir. 1987), makes this distinction between imposing straight common law tort liability under respondeat superior and broadening the scope of an employer's liability under agency principles under the doctrine of Title VII. *Sparks*, 830 F. 2d at 1558-59. We agree with appellant that applying the broader general agency theory in supervisor liability cases fits with the purpose of Title VII, which broadly defines "employer" to include any "agent" of the employer and which is intended to effectuate the remedial and public policy goals of the Civil Rights Act of 1964. *Spencer v. General Electric Co.*, 894 F. 2d 651, 657 (4th Cir. 1990).

Appellant argues that applying general agency principles effectively establishes strict liability. However, we disagree and note that while the *Yates* court rejected the theory of strict liability in hostile environment cases, it established that broader agency factors -- when, where, and foreseeability -- can be applied without establishing strict liability. *Yates*, 819 F.2d at 639 (Nelson, J., concurring).

In *Yates*, the court specifically held that none of the agency factors "would indicate that Avco should be absolved of the responsibility" for its supervisor's actions. *Yates*, 819 F. 2d at 636. The harassment took place at the office; it was carried out by someone with the ability to fire, hire, promote, and discipline employees; and "[t]here is no question that it [the harassment] was foreseeable. Had it not been, Avco would not have had a policy attempting to deal with it." *Yates*, 819 F.2d at 636.

However, as indicated in *Yates*, agency liability is not

strict and can be negated if the employer responds adequately and effectively once it has notice of the actions. Thus, if Avco's sexual harassment policy had been less flawed, Avco might not have been liable. For, although such a policy confirms the element of foreseeability and establishes agency, the policy itself, if effective, could serve as an insulation from liability. Indeed, Avco's liability was based on its failure to respond adequately and effectively to the problem when it had notice of its supervisor's proclivities at an earlier date.

Under this legal framework for hostile working environment claims, the determination of whether or not Allied is liable for its supervisor's actions depends on 1) whether Butts's harassing actions were foreseeable or fell within his scope of employment and 2) even if they were, whether Allied responded adequately and effectively to negate liability. In granting Allied summary judgment, the district court concluded that:

> Butts' actions were outside the scope of employment, that Allied did not know, or even upon reasonably diligent inquiry, could not have known, that Butts was harassing Kauffman and that Allied's response was prompt and adequate.

While we think that Butts's actions were within the scope of his employment, we agree with the district court that Allied's response was prompt and adequate and thus find no agency liability.

In applying agency principles, the key question is whether the act complained of took place in the scope of the agent's employment. Under *Yates*, the determination requires an examination of the factors of when and where the acts took place, and their foreseeability. The first thing to note is "that even though an act is forbidden it may still be within the scope of employment. Restatement

(Second) of Agency § 230" *Yates*, 819 F. 2d at 636. In finding agency liability, the *Yates* court focused on the fact that the supervisor had the ability to hire, fire, discipline, and promote the employees.

Here, the district court determined that since Butts did not have the ability to fire, hire, promote, and discipline on his own without the ERD, Allied was not liable as Butts did not qualify as its agent under "scope of employment" standards. We disagree. "An individual qualifies as an 'employer' under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment." *Paroline v. Unisys Corp.*, 879 F. 2d 100, 104 (4th Cir. 1989), *modified on other grounds*, 900 F. 2d 27 (4th Cir. 1990) (en banc). "The supervising employee need not have ultimate authority to hire or fire to qualify as an employer, so long as he or she has significant input into such personnel decisions." *Ibid.* Here, Butts did not have ultimate authority to hire or fire, but he did have significant input in the process. At the very least, a question of fact exists as to whether Butts had enough authority to qualify as an agent and therefore as an "employer" under Title VII.

However, even if Butts were acting within the scope of his employment, Allied is protected from liability because its response upon learning of Butts's harassment was adequate and effective. As soon as Kauffman's union representative informed the Director of Employee Relations about Butts's harassment of Kauffman between April 11 and 13, the management immediately confronted Butts and fired him.

Nonetheless, Kauffman argues that Allied's policy against sexual harassment was ineffective and did not work effectively in this case. She points to the fact that neither she nor another co-employee ever knew that such a policy existed, nor had they seen the policy posted

anywhere in the factory. In addition, the management had never established any guidelines to deal with the prevention of sexual harassment. There had also been no meetings in the last five years by management with either supervisors or salaried employees on the subject. Finally, appellant points to the testimony of the Director of Employee Relations, who stated that to his knowledge there had never been any meetings with supervisory personnel on the subject of sexual harassment in the work-place.

The gist of the appellant's argument is that the policy was ineffective and that "[m]anagement's termination of Butts was more of a knee jerk reaction to the incredibly outrageous and senseless acts of Butts rather than reliance on any company policy." As for the adequacy and promptness of Allied's response to Butts's sexual harassment, Kauffman admits that the response was prompt, but denies that it was adequate, characterizing the firing as a reactionary measure rather than a result of an effective, efficient corporate mechanism designed to deal with this type of conduct.

Appellant also argues that Allied should be liable under Restatement (Second) of Agency § 219(2)(b), which imposes liability on the part of an employer for the acts of its agent outside the scope of employment whenever the employer is negligent or reckless. Negligence here would be defined as failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care, should have known existed. *Carrero v. New York City Housing Authority*, 890 F. 2d 569 (2nd Cir. 1989).

These claims of negligence and inadequate policy are not supported by the record. Whatever one may think about the adequacy of Allied's sexual harassment policy *ex ante*, it worked and was adequate in this situation. Allied immediately fired the offending supervisor to

correct the hostile working environment which he created. As for Kauffman's post-April 1988 claims -- that her house had been under surveillance, that she received various threats and that when she returned to work after the harassment she was placed on three different shifts and given several different job assignments which had never happened before the harassment -- these were never alleged in her amended complaint and are not part of this appeal. As the district court held: "[Kauffman] has not included and does not wish to include any allegations of sexual harassment after April 13, 1988."

III

Under a "quid pro quo" theory of sexual harassment, an employer is held strictly liable for the conduct of its supervisory employees having authority over hiring, advancement, dismissal, and discipline, under a theory of respondeat superior. *Highlander v. KFC Nat'l. Management Co.*, 805 F. 2d 644, 648 (6th Cir. 1986). To prevail under a quid pro quo theory, a plaintiff must assert and prove:

> 1) that the employee was a member of a protected class; 2) that the employee was subjected to unwelcomed sexual harassment in the form of sexual advances or requests for sexual favors; 3) that the harassment complained of was based on sex; 4) that the employee's submission to the unwelcomed advances was an express or implied condition for receiving job benefits or that the employee's refusal to submit to the supervisor's sexual demands resulted in a tangible job detriment; and 5) the existence of respondeat superior liability.

Highlander, 805 F. 2d at 648. The two factors in dispute here are whether Butts had plenary authority over Kauffman and whether Kauffman suffered a tangible job detriment.

Under the theory of respondeat superior, employers are held strictly liable for conduct of supervisory personnel who have plenary authority to hire, fire, promote, and discipline employees. *Highlander*, 805 F. 2d at 648. The court reasoned that because "Title VII defines 'employer' to include 'a person engaged in an industry affecting commerce . . . and any agent of such person,' knowledge of an employment decision based on impermissible sexual factors is imputed to the employer." *Highlander*, 805 F. 2d at 649 (citations omitted).

Kauffman argues, as she did in her hostile environment sexual harassment claim, that even though Butts did not have complete authority concerning hiring and firing, nowhere is it required that a supervisor must have complete authority in all respects concerning hiring, firing, and controlling and supervising to be an agent and therefore an employer under Title VII. 42 U.S.C. § 2000e(b). Instead, appellant argues that an individual qualifies as an employer under Title VII if he or she serves in a supervisory position and exercises significant control over the employee's firing, hiring, or conditions of employment. *See Paroline*, 879 F. 2d at 104.

Appellant is correct in her statement that nowhere is it required that an employee must exercise complete control of plenary duties to qualify as an agent of the employer. Rather, all that is required is that the employee have "significant control" of those duties. However, this still leaves the factual question of whether Butts exerted "significant control" over employment conditions. This is a question of fact that is disputed, and, at the very least, the record presents a material issue of fact as to whether Butts possessed plenary authority over Kauffman. Therefore, summary judgment is inappropriate if Butts's actions resulted in a job detriment to Kauffman.

The district court held that Kauffman did not suffer a tangible job detriment, as it held that a tangible job

detriment must be economic in nature and Kauffman suffered no such economic detriment. However, the only case cited by both the court and the appellee to support this notion is *Mitchell v. OsAir, Inc.*, 629 F. Supp. 636 (N.D. Ohio 1986), a hostile environment case decided while *Vinson* was waiting to be heard by the Supreme Court, which had already granted certiorari. In support of creating a hostile environment cause of action, the court held that

> a supervisor confronted by a woman subordinate who refuses to tolerate a hostile working environment can alter working conditions in subtle ways which would *probably* not be recognized by a *quid pro quo* claim - by giving her less desirable assignments, worse evaluations of her performance, more heavy-handed treatment in the details of day-to-day employment.

Mitchell, 629 F. Supp. at 643 (emphasis added). Allied also cites *Shrout v. Black Clawson, Inc.*, 689 F. Supp. 774 (S.D. Ohio 1988), which merely states that quid pro quo harassment is "harassment in which a supervisor demands sexual consideration in exchange for *job benefits*." *Id.* at 780 (emphasis added). Neither of these cases explicitly limits tangible job detriments to economic loss.

A broader notion of tangible job detriment is found in *Chamberlin v. 101 Realty, Inc.*, 915 F. 2d 777 (1st Cir. 1990), where the court held that quid pro quo harassment exists

> "when a supervisor conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate, *or* punishes that subordinate for refusing to comply." It is the essence of *quid pro quo* harassment that the employee "was subject[ed] to unwelcome sexual

> advances by a supervisor . . . and . . . her reaction to these advances affected tangible aspects of . . . her compensation, terms, conditions, or privileges of employment . . . ." In rebuttal, the defendant may show that the behavior complained of either did not take place or that it did not affect a tangible aspect of the plaintiff's employment . . . ."

Id. at 783 (citations omitted) (emphasis in original).

However, even if we find that a tangible job detriment need not be economic, it is not clear that being assigned to a manual machine for a day would qualify as a non-economic tangible job detriment. While *Highlander* seems to impose strict liability for quid pro quo harassment where there is a tangible job detriment, there may be a *de minimis* exception for temporary actions, such as in this case, or where further remedial action is moot and no economic loss occurred. Given the mandate of *Highlander* and the indeterminate nature of Kauffman's tangible detriment, we remand on the issue of quid pro quo liability to consider the sole issue of the detriment caused by the machine transfer.

As for Kauffman's state law claims, we affirm the district court's dismissal without prejudice of plaintiff's state law claim of intentional infliction of serious emotional distress in an employment setting because it presents an issue of first impression that would be best settled by the Ohio courts.

At issue is whether Kauffman's claim is time-barred pursuant to Ohio Rev. Code § 4121.80(A), which applies a one-year statute of limitations for employers' intentional torts. Kauffman argues that the four-year period applicable to intentional infliction of emotional distress claims should apply. Ohio Rev. Code § 2305.09. Allied argues that § 2305.09 is preempted by Ohio's Worker

Compensation Statute, Ohio Rev. Code § 4121.80. Kauffman submitted her claim of intentional infliction of serious emotional distress to the Industrial Commission of Ohio to determine if it was covered by Ohio's Workers Compensation Laws. Coverage was denied, but plaintiff appealed and is still waiting for disposition of the issue.

A district court has the power to exercise pendant jurisdiction over state claims that arise out of the same common nucleus of operative fact as the federal claim.[2] *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). This exercise of pendant jurisdiction is discretionary and includes consideration of such factors as judicial economy, convenience, and fairness to the litigants. Since such a decision is discretionary, a dismissal of a pendant claim can only be reversed if we find it an abuse of discretion. *McLaurin v. Fischer*, 768 F.2d 98, 104-05 (6th Cir. 1985). Given the complexity of the issue, we do not find that the district court abused its discretion in refusing to exercise pendant jurisdiction over the state claim. We leave the state claim to the Ohio state courts.

We AFFIRM the district court's dismissal of Kauffman's hostile environment claim, but REVERSE and REMAND for further proceedings on Kauffman's quid pro quo claim.

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[2]In 1990, Congress passed 28 U.S.C. § 1367, which replaced the concepts of "pendant" and "ancillary" jurisdiction with "supplemental" jurisdiction. However, this statute only applies to civil actions commenced on or after December 1, 1990. Kauffman filed her original complaint on September 12, 1989; therefore, 28 U.S.C. § 1367 does not govern this case.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION FILED MAY 17, 1992

Case No. 3:89CV7531

LUCILLE R. KAUFFMAN,

Plaintiff(s),

-vs-

ALLIED SIGNAL, INC., et al.,

Defendants(s).

WALINSKI, J.

This cause is before the Court on cross-motions for summary judgment and on defendant Allied Signal's motion to strike portions of certain affidavits attached to plaintiff's reply memorandum in support of her motion for summry judgment and plaintiff's opposition thereto. This Court has jurisdiction pursuant to 28 U.S.C. §1331.

Background

Plaintiff, Lucille R. Kauffman (Kauffman), is employed by defendant, Allied Signal, Inc., Autolite Division (Allied), at its Fostoria, Ohio plant as an isostatic press operator. She was assigned to Dept. no. 3 on machine no. 110. Her supervisor was Donald Butts (Butts). Butts had been employed by Allied for at least 20 years prior to his retirement in 1986. In 1987, he came back to work for Allied as a temporary supervisor pursuant to an

agreement with The Rumpf Corporation.[1] As a supervisor, Butts asigned jobs, analyzed production problems, transferred product from process to process, and could discipline employees after consultation with his immediate supervisor. He could hire and fire employees only in conjunction with his immediate supervisor, Employee Relations and the union.

Butts and Kauffman had known each other through their association at work for 12 years prior to the incidents which gave rise to this lawsuit. They had socialized together and had discussed personal matters with each other over the years. Butts was aware of Kauffman's previous bout with alcoholism, her marital problems, her bi-polar disorder which made her susceptible to severe emotional mood swings, her difficulties in dealing with stress and her vulnerability to criticism about her personal appearance.

Sometime in early 1988, Kauffman took a medical leave of absence to have breast enlargement surgery. This was done to enhance her looks and raise her self-esteem. She told only a few close confidants at the plant about her surgery. When Kauffman returned to work on April 11, 1988, Butts came up behind her, put his arm around her, allegedly touched her on the left breast[2],, attempted to look down her blouse and asked her "[W]hy didn't you tell me you were getting new tits? When do we get to see them?" On April 12, 1988, Kauffman was reassigned to machine no. 108. Machine no. 108 was a manual press that created extra

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1. Rumpf provided payrolling services to Allied for Butts. Rumpf was dismissed from this lawsuit without prejudice at Kauffman's request on October 22, 1990.

2. Kauffman did not allege that Butts touched her breast in either the handwritten outline dated April 13, 1988 she gave to her union representatives or in her EEOC affidavit.

work for the operator because it had to be watched the entire shift.[3] Butts told Joyce Cooper, a co-worker, that he had assigned Kauffman to that press as "punishment, because she wouldn't show me her tits." Kauffman was informed of this incident a couple of months later. On April 13, 1988, Kauffman was operating her regular press, no. 110, when Butts threw a spark plug insulator at her and hit her in the hip. He also told Bill Barfield (Barfield) in front of John McMeen (McMeen) that "[I]f you get to see Lou's tits before [do, I'll be pissed." Barfield told Kauffman of this incident. That same evening, Butts told a maintenance worker, R.T. Smith (Smith), to ask Kauffman to " [S]how me your tits." When Kauffman became upset, Smith apologized and told her that he did it as a joke and that Butts had told him to do it. Kauffman observed Butts and McMeen laughing during this incident. Also, throughout this three day period, approximately 20 other co-workers approached Kauffman and made comments to her about her surgery. Kauffman has alleged that Butts told them of her surgery but no proof has been offered to support this allegation.

Immediately after the incident with Smith, Kauffman went to her union representatives and complained. She prepared a written statement of the events that had occurred the last three days and, with the union officials, presented it to Sam Harmon (Harmon), Director of Employee Relations. Harmon, together with Ernest Dunn, Vice-President of Manufacturing and Gerald Arnold, Manager of Production and Butts' immediate supervisor, confronted Butts with Kauffman's allegations. It is unclear what Butts' response was, but he was terminated on April 14, 1988. No action was taken against either McMeen or Smith.

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3. Apparently the other presses were all automatic and required less work by the operator.

Appendix B

Allied has had a written policy against sexual harassment since 1981. In it, employees are urged to file complaints with the Employee Relations Department if they feel they have been sexually harassed. Additionally, there is a grievance procedure available through the collective bargaining agreement. However, none of Allied's top-level managers were aware of any specific procedure to handle such complaints and there has not been any meetings in the last five years with either supervisory personnel or salaried employees on the subject. Until Kauffman filed her grievance with her union, Allied had received only one other complaint of sexual harassment by a supervisor. rt did not involve either Kauffman or Butts. No complaints had been lodged against Butts.

Kauffman filed a claim with both the Equal Employment Opportunity Commission (EEOC) and the Ohio Civil Rights Commission. After receiving a right to sue letter from the EEOC, she filed this lawsuit against Allied.[4] Kauffman seeks to recover damages for violations of Title VII of the Civil Rights Act of 1964 (Title VII) under both a hostile work environment theory and a *quid pro quo* theory and for the intentional infliction of emotional distress.

It also appears that this lawsuit has fired the emotions of some of the employees at Allied. Kauffman has alleged that she has received threats and observed surveillance of her home and activities since the harassment. However, her amended complaint is based only on the sexual harassment that allegedly occurred between April 11, 1988 and April 13, 1988. She has not included and does not wish to include any allegations of sexual harassment

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4. Kauffman has filed an action against Butts in the Court of Common Pleas of Seneca County, Ohio, case no. 45274.

after April 13, 1988.

Both Kauffman and Allied now move this Court for summary judgment on the issue of Allied's liability only. Each party has briefed the issues extensively. Additionally, Allied has moved to strike portions of certain affidavits that Kauffman has attached to her reply memorandum for failure to comply with Fed. R. Civ. P. 56(e).

Discussion

The first issue that must be dealt with is Allied's motion to strike. Kauffman has attached to her reply memorandum the affidavits of Cynthia L. Evans, M.D. (Evans), her psychiatrist, Barfield and herself. She has also submitted "clarifying affidavits" from Evans and Barfield. Allied moves to strike portions of each.

Affidavits supporting and opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). if an affidavit is based merely on information and belief, it will be stricken. 6-Pt.2 J. Moore & J. Wicker, *Moore's Fed. Prac.* §56.22 [1] . Hearsay testimony that is inadmissible because it does not fit one of the exceptions or opinion testimony that would be inadmissible at trial will be disregarded. Id. Affidavits should contain only evidence that is material to the issues raised by the pleadings and would be admissible if the affiant were testifying in court. rd. Any portion of an affidavit that contains inadmissible evidence will be stricken. *Id.*

Allied first moves to strike the second sentence in ¶9 and ¶¶11 and 12 of Evans' first affidavit. In ¶9, Evans' testifies that she "knew" that a Dr. Thomas Hadley (Dr. Hadley) was employed as

Allied's company doctor in December of 1989 or early 1990. Dr. Hadley has testified that he was never Allied's company doctor, but an independent contractor who rendered medical opinions as to when Allied's employees could return to work after organic injuries or ailments. Evan's statement is clearly based solely on her information and belief and must be stricken. In ¶11, Evans' testifies that, in a conversation with Dr. Hadley, they agreed that Kauffman would be unable to return to work at Allied because of this lawsuit. In ¶12, Evans testifies that she told Kauffman that, based on her perception of Dr. Hadley's statements during this conversation, Kauffman was "history" if she returned to Allied. Evans' impressions of her conversation with Dr. Hadley contained in ¶11 are within her personal knowledge and are admissible. Whether the conversation occurred as she remembers it is a matter of credibility. The first sentence of ¶12 is admissible for the same reason. The second sentence of ¶12 is admissible up to the last phrase ". . . and [Dr. Hadley] indicated to me that her continued prospects for employment at Allied were not very good." This is inadmissible hearsay and will be stricken.

Allied also moves to strike ¶¶6, 8 and 13 of Evans' affidavit because, by agreement of the parties, the present motions deal only with the question of liability, not damages. However, to prove her claims of sexual harassment, Kauffman must show that she suffered severe psychological harm. Because this is a necessary element of those claims, ¶¶6, 8 and 13 are deemed admissible for that limited purpose only.

Allied next moves to strike the second sentence of ¶4, ¶¶5, 6 and 8, and the first sentence of ¶12 of Barfield's affidavit. The second sentence of ¶4 is inadmissible hearsay and will be stricken. Paragraph 5 is admissible except for the phrase ". . . Art Cuellar [another supervisor at Allied], who essentially had the same job functions and responsibilities as Donald Butts . . ." That phrase is

based on Barfield's information and belief and must be stricken. Paragraph 6 must be stricken for the same reason. The first sentence of '18 is admissible because it is based on Barfield's personal experience. The second sentence of ¶8 is based on Barfield's information and belief and will be stricken. Both parties agree that the first sentence of ¶12 is irrelevant and it will be stricken.

Allied finally moves to strike ¶10 of Kauffman's affidavit. However, it will be admitted for the limited purpose of attempting to prove Allied's lack of an adequate and reasonable response to Butts' sexual harassment.

Allied has also moved, pursuant to a Rule 56(f) affidavit, for an extension of time to conduct additional discovery if its' motion to strike is denied. Given the above disposition, the Court does not feel that an extension of time is warranted and the same is denied.

Allied and Kauffman both move this Court for summary judgment, arguing that there is no issue of material fact and that each is entitled to judgment as a matter of law. Rule 56, Fed. R. Civ. P., directs the disposition of a motion for summary judgment. in relevant part Rule 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Court's function in ruling on a motion for summary judgment is to determine if any genuine issue exists for trial, not to

resolve any factual issues, and to deny summary judgment if material facts are in dispute. *United States v. Articles of Device* 527 F.2d 1008, 1011 (6th Cir. 1976); *Tee-Pak. Inc.. v. St. Regis Paper Co.*. 491 F.2d 1193, 1195 (6th Cir. 1974). Further, " [i] n ruling on a motion for summary judgment, the evidence must be viewed in a light most favorable to the party opposing the motion." *Bouldis v. U.S. Suzuki Motor Corp.*711 F.2d 1319, 1324 (6th Cir. 1983). To summarize, summary judgment is only appropriate when no genuine issue of material fact remains to be decided, and when the undisputed facts, viewed in a light most favorable to the non-moving party, entitle the movant to judgment as a matter of law. *Smith v. Pan Am World Airways,* 706 F.2d 771, 773 (6th Cir. 1983).

A principle purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). Rule 56(e) places responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence Of a material question of fact or that the underlying substantive law does not permit such a decision. In relevant part the provision states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials Of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. if he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56 (e), Fed. R. Civ. P. Rule 56(e) requires the non-moving party to go beyond the pleadings, and by affidavits, depositions,

answers to interrogatories, or admissions on file, designate specific facts showing a genuine issue for trial. *Celotex Corp. v. Catrett.* 477 U.S. at 3Z4.

In her amended complaint, Kauffman asserts that Allied is liable for Butts' actions: (1) pursuant to Title VII under a "hostile work environment" theory; (2) pursuant to Title VII under a *quid pro quo* theory; and (3) on a pendent state law claim for the intentional infliction of emotional distress. She is not alleging any further harassment after April 13, 1988. Both parties have briefed the issues extensively.

Kauffman's first claim for relief is for a violation of Title VI– under a "hostile work environment" theory. To determine whether or not Allied is liable for Butts' actions under this theory, the Supreme Court, in *Meritor Svg.. Bank. FSB v. Vinson,* 477 U.S. 57, 72 (1986), held that the courts were to look to agency principles for guidance. The Court refused, however, to issue a definitive rule on employer liability. Instead, it stated that:

> [w]hile such common-law [agency] principles may not be transferrable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. §2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§219-237 (1958).

Id. The Court did suggest that an employer may be able to insulate itself from liability if it had an effective grievance procedure and a policy against sexual harassment that was "calculated to encourage victims of harassment to come forward. *Id* at 72-73.

Determining which of the common-law agency principles and which of their respective particulars are transferrable to a Title VII action are at the crux of this dispute. Kauffman urges this Court to follow the lead of Justice Marshall in his concurring opinion in *Vinson*, and, more specifically, that of the Eleventh Circuit in *Sparks v. Pilot Freight Carriers. Inc.*, 830 F.2d 1554 (11th Cir. 1987), and hold that Allied is liable even if Butts was acting outside the scope of his employment and Allied was without notice. Justice Marshall stated that, because under a *quid pro quo* theory a supervisor's harassment of a subordinate employee that results in a tangible job detriment is automatically imputed to the employer, the same rule should apply in a hostile work environment situation. *Vinson* 477 U.S. at 76-78. In *Sparks* the Eleventh Circuit relied on the Restatement (Second) of Agency 219(2)(d) (1958) to reach the same conclusion.

In *Sparks*, the plaintiff was a billing clerk employed by Pilot Freight Lines (Pilot Freight) at their Duluth, Georgia trucking terminal. She claimed that the terminal manager, the highest ranking company official at that terminal, sexually harassed her over a period of time, repeatedly reminding her that he could fire her if she failed to comply with his advances. The court overturned the district court's grant of summary judgment in favor of Pilot Freight and specifically adopted the Restatement (Second) of Agency §219(2)(d). That section states that a master is liable for the torts of its servants acting outside the scope of their employment where:

> the servant purported to act or to speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relationship.

Restatement (Second) of Agency.

The *Sparks* court then reasoned that, because Title VII defines an "employer" as "a person engaged in an industry affecting commerce ... and any agent of such a person", 42 U.S.C. §2000e(b), and EEOC guidelines state that a supervisor acts as an "agent" for Title VII purposes whenever that supervisor exercises actual authority by "making or threatening to make decisions affecting the employment status of his subordinates", Pilot Freight was liable for the actions of its terminal manager. *Id.* at 1559-60. Furthermore, Pilot Freight could not avail itself of the defense suggested in *Vinson* because it proffered no evidence that it had either a policy against sexual harassment or an effective grievance procedure. The plaintiff had alleged that Pilot Freight had neither. *Id.* at 1560. It is important to also note that the *Sparks* court did not address the issue of what rule should apply in the situation where the supervisor did not explicitly or implicitly threaten to use his authority against the victim; i.e. where the sexual harassment claim rests exclusively on a hostile work environment theory. *Id* at 1560, n.9.

Despite Kauffman's urging, this Court is bound by what the Sixth Circuit has done, not by what the Sixth Circuit might do. The leading case in this Circuit is *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987). in that case, an Avco supervisor sexually harassed two different secretaries over an extended period of time. When the secretaries complained to management, they were asked to not go to the EEOC with their complaints because the matter would be

dealt with internally by Avco. Avco refused to give them transcripts of tape recorded statements they had made in conjunction with the company's investigation and refused to correct their personnel files regarding sick leaves each had taken as a direct result of the situation. These facts indicated to the court that Avco's internal sexual harassment policy was not functioning properly. *Id* at 634-35. Also, Avco had notice of that supervisor's tendencies to sexually harass female employees at least two years prior to the beginning of the incidents in question. *Id* at 635. Thus, the court upheld a magistrate's finding that Avco knew, or upon reasonably diligent inquiry should have known, that the sexual harassment was taking place. *Id* at 636.

The court then analyzed the situation under traditional agency principles. It held that:

> [t]he essential question in applying agency principles is whether the act complained of took place in the scope of the agent's employment. This determination requires an examination of such factors as *when* the act took place, *where* it took place, and whether it was *foreseeable. See generally* Restatement (Second) of Agency §§217-232 (1958). The Restatement specifically provides that even though an act is forbidden it may still be within the scope of employment. Restatement (Second) of Agency §230. Here the harassment took place at the office, during working hours and was carried out by someone with the authority to hire, fire, promote and discipline the plaintiffs. There was no question it was foreseeable. Had it not

> been, Avco would not have had a policy attempting to deal with it.

Id. (emphasis supplied). The court then held that none of the agency factors absolved Avco of responsibility and, additionally, Avco should have dealt with the problem when it first came to their attention and its response to the plaintiffs' complaint was inadequate.

In the case *sub judice* it is clear that Allied did not know, or upon reasonably diligent inquiry, should have known, that Butts was sexually harassing female employees. Kauffman's complaint was the first one registered against Butts in his entire tenure at Allied. There had only been one other sexual harassment complaint filed at Allied since 1981 and that involved neither Kauffman nor Butts. Also, Allied's policy against sexual harassment and its grievance procedures operated effectively to eliminate the sexual harassment. One day after Kauffman complained to her union representatives about Butts' conduct, he was confronted with the allegations and fired.

The essential question then is: "was Butts acting within the scope of his employment when he harassed Kauffman?" While it is true that his actions took place at Allied's factory during working hours, Butts did not have the authority to hire, fire, promote, or discipline Kauffman on his own. Also, the only argument that his actions were foreseeable is that Allied had a policy against such harassment. However, that policy and the corresponding grievance procedure contained in the collective bargaining agreement worked effectively in this case. Unlike *Yates*, there are no allegations that Allied's management attempted to sweep this incident under the rug. Kauffman complained to her union representatives on April 13, 1988. On April 14, 1988, Butts was confronted with her allegations and terminated. This must be the

situation the *Vinson* court envisioned when it suggested that an employer may be able to insulate itself from liability if it had an effective grievance procedure and a policy against sexual harassment that was "calculated to encourage victims of harassment to come forward. *Meritor Svg.. Bank. FSB v. Vinson*, 477 U.S. at 72-73.

Conduct is within the scope of an agent's employment if "(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master." Restatement (Second) of Agency §228(1)(a-c) (1958).It cannot be argued that Butts' conduct was of a kind he was employed to perform nor was it actuated, even in the smallest part, by a purpose to serve Allied.

Kauffman also has alleged that Allied's response, while prompt, was inadequate in that it has failed to quell the hostile feelings among other Allied employees engendered by this lawsuit. However, it is not clear what exactly Allied could do in this regard. Allied cannot dictate to its people how they are to think and to feel, only how they are to act on company time. While Kauffman has raised allegations of threats and surveillance since the harassment, she has not proffered any evidence that such conduct is within the purview of Allied's control. As such, this Court finds that Butts' actions were outside the scope of employment, that Allied did not know, or even upon reasonably diligent inquiry, could not have known, that Butts was harassing Kauffman and that Allied's response was prompt and adequate. Summary judgment on this count must be entered in favor of Allied.

Kauffman's second claim for relief is based on a *quid pro quo* theory pursuant to Title VII. Under that theory, Kauffman must prove that:

> (1) she was a member of a protected class; (2) that she was subjected to unwelcomed sexual harassment in the form of sexual advances or requests for sexual favors; (3) that the harassment complained of was based on sex; (4) that her submission to the unwelcomed advances was an express or implied condition for receiving job benefits or that her refusal to submit to Butts' sexual demands resulted in a tangible job detriment; and (5) the existence of *respondeat superior* liability.

Highlander v. K.F.C. Nat. Management Co. 805 F.2d 644, 648 (6th Cir. 1986) (citations omitted). Employers are strictly liable for the conduct of supervisors who have plenary authority over the hiring, firing, promotion and discipline of an employee under the theory of *respondeat superior. Id.*

Kauffman argues that Butts' actions in placing her on machine no. 108 the night of April 12, 1988 constituted a tangible job detriment because that press required more work than did her normal press, machine no. 110. She has supplied the affidavit of a co-worker, Joyce Cooper (Cooper) to that effect. Cooper testified that employees in Dept. 3 were not assigned to machine no. 108 unless their regular press was inoperable. In this instance, she observed another employee operating Kauffman's regular press that night. She also testified that Butts told her that Kauffman was assigned to machine no. 108 as "punishment, because she wouldn't show me her tits."

Allied argues that it is not liable because the assigning of Kauffman to machine no. 108 does not rise to the level of a tangible job detriment but was merely an example of less desirable work assignments or heavy handed treatment that at best would be

evidence of a hostile work environment. A tangible job detriment must be economic in nature; i.e. a demotion, a cut in pay or a termination *See Mitchell v. OsAir Inc*, 629 F. Supp. 636, 643 (ND Ohio 1986) ("a supervisor confronted by a woman subordinate who refuses to tolerate a hostile environment can alter working conditions in subtle ways which would probably not be recognized by a *quid pro quo* claim-by giving her less desirable assignments, worse evaluations of her performance, more heavyhanded treatment in the details of day-to-day employment."). Allied also argues that Butts did not have the necessary plenary authority over Kauffman as he could not hire, fire, promote or discipline her without consulting Employee Relations and the union.

This Court is persuaded that Butts' actions in placing Kauffman on machine no. 108 for one evening do not rise to the level of a tangible job detriment. She was back on her regular machine the very next evening. While in no way condoning Butts' actions, the placing of Kauffman on machine no. 108 is at best evidence of his creating a hostile environment.

Even if Butts' actions did constitute a tangible job detriment, he did not have the plenary authority over Kauffman that would give rise to a finding of *respondeat superior* liability. Butts could only hire, fire, promote or discipline employees in conjunction with Employee Relations and the union. He could not do it on his own. Kauffman has failed to proffer any credible evidence to the contrary. The only case she has been able to cite in support of her position is *Graves Trucking Inc. v. N.L.R.B.*, 692 F.2d 470 (7th Cir. 1982). That case, however, is inapposite. Graves dealt with unfair labor practices. While Justice Marshall, in his concurring opinion in *Meritor Svg. Bank. FSB v. Vinson* 477 U.S. 57, 75, n.1 (1986), stated that "[T]he remedial provisions of Title VII were largely modeled on those of the National Labor Relations Act (NLRA)," he did not evince an intent to also incorporate the NLRA's liability

provisions into Title VII. The employer in *Gates* was found liable for its supervisor's actions because it failed to properly repudiate those actions. The same analysis does not apply here. Allied fired Butts as soon as his actions came to their attention. If the NLRA did apply in this situation, Allied would not be liable because it specifically repudiated Butts' actions.

Kauffman's third claim for relief is a pendent state law claim for the intentional infliction of emotional distress. She submitted her claim to the industrial Commission of Ohio to determine if it was covered by Ohio's Workers Compensation laws. Coverage was denied but she is presently appealing that decision.

Allied argues that Kauffman's claim is time-barred pursuant to Ohio Rev. Code §4121.80(A), which applies a one-year statute of limitations for employers' intentional torts. Allied argues that this statute preempts any other statute. Kauffman argues the four-year period applicable to intentional infliction of emotional distress claims should apply. Ohio Rev. Code §2305.09. Because this appears to be an issue of first impression, it is a matter best settled by the Ohio courts. As such, this Court refuses to exercise its pendent jurisdiction and hereby dismisses Kauffman's third claim for relief without prejudice.

Accordingly, it is

ORDERED that defendant Allied Signal Inc. Autolite Division's motion to strike is granted in part and denied in part.

FURTHER ORDERED that defendant Allied Signal Inc. Autolite Division's motion for an enlargement of time is denied.

FURTHER ORDERED that defendant Allied Signal Inc. Autolite Division's motion for summary judgment is granted as to

Appendix B

Counts 1 and 2 of plaintiff's amended complaint and denied as to Count 3 of plaintiff's amended complaint.

FURTHER ORDERED that plaintiff's motion for summary judgment is denied as to Counts 1 and 2. Count 3 to be dismissed without prejudice.

s/ Nicholas J. Walinski
NICHOLAS J. WALINSKI
SENIOR U. S. DISTRICT JUDGE

TOLEDO, OHIO
May 17, 1991

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No. 92-700

IN THE

Supreme Court of the United States

October Term, 1992

LUCILLE R. KAUFFMAN,
Petitioner,

vs.

ALLIED-SIGNAL INC., AUTOLITE DIVISION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RULE 29.1 STATEMENT

There is no parent or subsidiary company to be listed.

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No. 92-700

IN THE

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LUCILLE R. KAUFFMAN,
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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The case arises out of the offensive conduct of an Allied-Signal Inc. ("Allied") supervisor over a three day period in April, 1988. The supervisor had no history of such conduct (Dist. Ct.Op., A.22a, 31a).[1] When Allied learned about the conduct, it immediately confronted and terminated the offending supervisor (Ct.App.Op., A.3a, Dist.Ct.Op., A.21a).

[1] References are to the Court of Appeals Opinion (Ct.App.Op.) or to the District Court Opinion (Dist.Ct.Op.) which appear in the Appendix (A.) to the Petition.

Since at least 1981, Allied has had a written policy against sexual harassment (Ct.App.Op., A.3a; Dist.Ct.Op., A.22a). The policy urges employees to present complaints about sexual harassment to management through the employee relations department (*Id*). Although Petitioner claims she was unaware of the policy, Allied's policy against sexual harassment is posted throughout the plant (Ct.App. Op., A.4a). Allied's policy against sexual harassment was the subject of "special" meetings with supervisors before 1986 and was discussed thereafter with supervisors on many occasions (*Id;* Dist.Ct.Op., A.31a).

Allied's hourly employees, such as Petitioner, are also protected by a collective bargaining agreement between Allied and United Auto Workers, Local 533 (Ct.App.Op., A.3a-4a; Dist.Ct.Op., A.21a-22a). The collective bargaining agreement prohibits sexual harassment and establishes a grievance procedure through which employees can pursue complaints of sexual harassment (*Id*). Union officials assist employees with grievances and complaints (*Id*).

On April 11, 1988, the supervisor made offensive remarks to Petitioner respecting her breast enlargement surgery (Ct.App.Op., A.2a; Dist.Ct.Op., A.20a). On April 12, 1988, the supervisor reassigned Petitioner to a different machine for the day (Ct.App.Op., A.3a; Dist.Ct.Op., A.20a-21a). On April 13, 1988, the supervisor threw a spark plug insulator at the Petitioner (*Id*).

On April 13, 1988, Petitioner contacted her union representatives and they prepared a written statement of the events (*Id*). The written statement was presented to Allied's director of employee relations who immediately confronted and terminated the supervisor (*Id*).

REASONS FOR DENYING THE WRIT

I. The Questions Presented Are Not Ripe For Review.

Petitioner presented two alternative theories of liability to support her Title VII claim: hostile work environment and quid pro quo. *See Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65-66 (1986). Although the court of appeals rejected Petitioner's hostile work environment theory, it reversed the district court's dismissal of her quid pro quo theory and remanded the case for further proceedings relating to that claim. *Id.* at p. 18a. Petitioner could, therefore, still obtain a judgment in her favor under Title VII.

Because the judgment below is not final,[2] the case is not yet ripe for review by writ of certiorari. *California v. Rooney*, 483 U.S. 307, 311-14 (1987); *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967); *Arnold v. United States*, 263 U.S. 427, 432-34 (1923). *See also John Simmons Co. v. Grier Brothers Co.*, 258 U.S. 82, 88-89 (1922) (Court of appeals decision that requires further proceedings in the district court before any final judgment is rendered is not ripe for supreme court review); *cf. Minnick v. California Department of Corrections*, 452 U.S. 105, 120-24 (1981) (Court will avoid granting certiorari to review state court decisions when further proceedings in state courts are contemplated).

The Court generally should avoid granting certiorari in a case such as this, "when time may further illumine or completely outmode the issue[s] in dispute." *Rice v.*

[2] An order or judgment is not "final" until it ends the litigation on the merits, and there are no further proceedings possible except for carrying the judgment into effect. *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. 1976, 1978 (1989); *Arnold v. United States*, 263 U.S. 427, 432-34 (1923).

Sioux City Memorial Park Cemetery, 349 U.S. 70, 77 (1955). If Petitioner ultimately loses her Title VII claim in the lower courts and chooses to petition the Court again, she may at that time raise the same questions. *California v. Rooney*, *supra*, 483 U.S. at 313.

II. There Is No Conflict Among The Federal Circuit Courts As to When An Employer Is Liable For Hostile Environment Sexual Harassment Perpetrated By A Supervisor.

Petitioner contends that the Sixth Circuit's standard for holding an employer liable for hostile environment sexual harassment by a supervisor conflicts with standards developed by other federal courts of appeals. There is no such conflict. Although the courts employ different language, they have in fact developed and applied uniform standards of liability. These standards are consistent with the directives this Court issued in *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986).

Meritor Savings Bank rejected the proposition that employers are strictly liable for hostile work environments created by supervisors. Rather than issuing a "definitive rule" on employer liability, the Court directed lower courts to consider the circumstances of the particular case and to employ agency principles for guidance. The Court recognized, however, that those principles are not "transferable in all their particulars to Title VII." 477 U.S. at 72.

Guided by the principles of the Restatement of Agency, the courts since *Meritor Savings Bank* have identified several possible bases for holding an employer liable for a hostile or offensive work environment created by a supervisor. The employer may be liable if (1) the harassment was within the supervisor's scope of

employment;[3] (2) the supervisor purported to act on behalf of the employer and had apparent authority to engage in the offending conduct or was aided in accomplishing the harassment by the existence of the agency relation;[4] (3) the employer was negligent or reckless. *See Hirschfeld v. New Mexico Corrections Department*, 916 F.2d 572, 576-77 (10th Cir. 1990) (quoting Restatement (Second) of Agency §219(2) (1958) hereinafter "Restatement").

In most cases, employees seek to hold employers liable for their own negligence in "failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." *Hirshfeld*, 916 F.2d at 577; *Kauffman v. Allied-Signal, Inc.*, 970 F.2d 178, 185 (6th Cir. 1992); *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1988).[5] All of the circuits that have addressed the issue since *Meritor Savings Bank* have applied this standard.

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[3] Most courts that have addressed the issue recognize that the "scope of employment" test is "largely inapposite in sexual harassment cases because 'sexual harassment simply is not within the job description of any supervisor or any other worker in any reputable business.' " *Hirschfeld*, 916 F.2d at 576 (quoting Holtzman & Trelz, *Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims After Meritor Savings Bank v. Vinson*, 31 St. Louis U.L.J. 239, 276 (1987)).

[4] Because supervisors also do not generally purport to act on behalf of their employers when harassing employees, liability is not generally imposed under the apparent authority standard. *But see Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1560 (11th Cir. 1987) (where employer had no policy against sexual harassment and no avenue for complaint, supervisor may have had apparent authority to harass employee).

[5] Some courts use the term "respondeat superior" to describe the standard of employer liability. Use of that label is not technically accurate when the employer is held directly liable for its own negligence, rather than derivatively liable for its agent's conduct. The respondeat superior and negligence standards are, however, the same. *See Hirschfeld*, 916 F.2d at 577, n.5; *Hall v. Gus Construction Co.*, 842 F.2d at 1010, 1015 (8th Cir. 1988).

- **First Circuit**: *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988) (employer is liable if officials knew or, in the exercise of reasonable care, should have known, of harassment, "unless that official can show that he or she took appropriate steps to halt it.");
- **Second Circuit**: *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59, 63 (2nd Cir. 1992) ("plaintiff must prove that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it");
- **Third Circuit**: *Andrews v. City of Philadelphia*, 895 F.2d 469, 486 (3rd Cir. 1990) ("liability exists where the [employer] knew or should have known of the harassment and failed to take prompt remedial action");
- **Fourth Circuit**: *Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir. 1989) (employer is liable if it had "actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action");
- **Fifth Circuit**: *Waltman v. International Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989) (employer is liable if it had actual or constructive knowledge of harassment and failed to take prompt remedial action);
- **Seventh Circuit**: *North v. Madison Area Association for Retarded Citizens*, 844 F.2d 401, 407 (7th Cir. 1988) (in absence of apparent authority to harass, employer is liable for discriminatory actions

attributable to supervisor "only if it knew or should have known of those actions and failed to take reasonable remedial measures"[6]);

- **Eighth Circuit:** *Jones v. Wesco Investments, Inc.*, 846 F.2d 1154, 1156 (8th Cir. 1988) (employer is liable in hostile environment cases where it "knew or should have known of the harassment in question and failed to take proper remedial action");
- **Ninth Circuit:** *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989) ("employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care, should have known");
- **Tenth Circuit:** *Hirschfeld*, 916 F.2d at 577 (10th Cir. 1990) (employer is liable for "failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew or in the exercise of reasonable care should have known");
- **Eleventh Circuit:** *Steele v. Offshore Ship Building Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) (liability in hostile environment cases "exists where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor.").

The Sixth Circuit's decision in *Kauffman* is consistent with these cases and the Restatement. Although the court appeared to combine the elements of

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[6] The *North* case involved racial, rather than sexual harassment. The court indicated, however, that its conclusions would apply to any claim under Title VII in which employer liability was an issue. *See* 844 F.2d at 407, n.7.

the different tests, the result would not be different if it analyzed the issues separately.[7]

The purported "conflict" among the courts of appeals on this issue is illusory. Following this Court's lead, the courts of appeals have developed standards that recognize the various bases for imposing liability upon employers for their supervisors' conduct. Contrary to Petitioner's suggestion, there cannot be any one formula that applies in all cases.

III. The Standards Applied By The Federal Circuits Are Consistent With The Holding In Meritor Savings Bank.

Apparently conceding that the circuit courts have developed consistent standards, Petitioner asks the Court to intervene to dismantle "judicially constructed barriers" to sexual harassment claims. According to Petitioner, the issues of notice and adequate response are not relevant to the analysis of an employer's liability for sexual harassment. Employers should be liable, Petitioner contends, whenever they fail to prevent sexual harassment by supervisors. In other words, Petitioner contends that employers should be strictly liable for supervisors' actions.

---

[7] The Sixth Circuit interpreted the scope of employment test very broadly and thus incorporated some of the negligence issues into its analysis. Most courts would find that the conduct of Allied's supervisor was not within the scope of his employment because Allied had an explicit and effective policy against sexual harassment that divested its supervisors of actual and apparent authority to harass employees. *See Meritor Savings*, 106 S. Ct. at 2408-09. Liability could not be imposed under the negligence standard, however, because once Allied was notified of the supervisor's conduct, Allied's remedial action was both prompt *and* effective. The result is, therefore, the same.

This Court addressed and unequivocally rejected in *Meritor Savings Bank* the arguments Petitioner raises. There is no reason to revisit these issues.

A. Notice

Petitioner contends that the "knew or should have known" standard applied by the circuit courts contravenes this Court's holding in *Meritor Savings Bank*. Petition at 18-19. Petitioner argues that this Court abrogated any notice requirement when it stated that "absence of notice to an employer does not necessarily insulate that employer from liability" for harassment by a supervisor. Petition at 19 (quoting *Meritor Savings Bank*, 477 U.S. at 72). The Court did not do so; it merely recognized that in certain circumstances an employer could be liable for a supervisor's harassment without actual notice.

None of the cases Petitioner cites make actual notice a prerequisite to an employer's liability for a supervisor's improper conduct. Under the negligence standard, an employer can be liable if the employer "should have known" or had "constructive knowledge" of the offensive conduct.[8] *See Kauffman*, 970 F.2d at 184 (6th Cir. 1992); *Lipsett*, 864 F.2d at 901 (1st Cir. 1988); *Andrews*, 895 F.2d at 1486 (3rd Cir. 1990); *Swentek v. USAIR, Inc.*, 830 F.2d at 558 (4th Cir. 1987); *Jones*, 793 F.2d at 720 (5th Cir. 1986); *Gus Const.*, 842 F.2d at 1015 (8th Cir. 1988); *Hacienda Hotel*, 881 F.2d at 1515-16 (9th Cir. 1988); *Hirschfeld*, 916 F.2d at 577 (10th Cir. 1990).

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[8] Employees can demonstrate constructive notice by "showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Waltman*, 875 F.2d at 478 (5th Cir. 1989). *Accord Swentek*, 830 F.2d at 558. In this case, Allied did not know and had no reason to know of the supervisor's conduct (Ct.App.Op., A.5a, 13a).

The courts have also not required actual notice under the "scope of employment" test. They have merely recognized that conduct generally must be foreseeable to be within the scope of employment. *See Kauffman*, 970 F.2d at 184.

B. Prompt and adequate remedial action

Petitioner claims that the decision below effectively relieves employers of any duty to prevent sexual harassment, as long as they take corrective action when improper conduct comes to their attention. Petition at 21. Petitioner misreads both the opinion below and the negligence standard.

As noted above, liability may be imposed upon an employer for its own negligence when it fails to remedy or to *prevent* a hostile offensive environment. *See Kauffman*, 970 F.2d at 185; *Hirschfeld*, 915 F.2d at 577; *Hacienda Hotel*, 881 F.2d at 1516. The court below considered and rejected Petitioner's claim that Allied negligently failed to prevent the harassment:

> These claims of negligence and inadequate policy are not supported by the record. Whatever one may think about the adequacy of Allied's sexual harassment policy, *ex ante*, it worked and was adequate in this situation. Allied immediately fired the offending supervisor to correct the hostile working environment which he created.

Kauffman, 970 F.2d at 185.

Having failed to prove that Allied was negligent in allowing the harrassment to occur, Petitioner seeks to change the law and to hold Allied liable simply because the harassment occurred. This Court has properly rejected such strict liability.

IV. There Is No Inconsistency In The Standard Applied By The Lower Courts In Sex Harassment Cases As Compared To Race/Religion/National Origin Harassment Cases.

Petitioner contends that an "inconsistency" has developed in the standards for sexual harassment cases and in cases involving harassment due to race/religion/national origin. Petition at pp. 23-24. She argues that "in all other Title VII contexts, save sexual harassment, courts do not consider intervening factors as barriers to employer liability for a supervisor's acts of discrimination." *Id.* (*citing Watson v. Fort Worth Bank and Trust*, 487 U.S. 978, 990-91 (1988)).

Watson does not stand for the proposition cited, nor does Petitioner cite any post-*Meritor Savings Bank* decisions that purport to apply different standards. No such inconsistency exists in the circuit court decisions. Indeed, the Sixth Circuit itself has unequivocally rejected the notion that hostile work environment cases are to be analyzed differently depending on whether the claims are based on sex as opposed to race. *See Risinger v. Ohio Bureau of Worker's Compensation*, 883 F.2d 475, 483-85 (6th Cir. 1989) (*citing Meritor Savings Bank, Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), and EEOC Compliance Manual §615.7).

Because there is no apparent conflict among the circuits, and because the Sixth Circuit itself does not use a different analytical framework depending upon the category of discrimination, this is not an appropriate case for the Court to address the issue.

V. This Is Not An Appropriate Case To Address The Issues Presented.

The Petition should also be denied because Petitioner asks this Court to render an advisory opinion. To be actionable under a "hostile work environment" theory, the sexual harassment "must be sufficiently *severe or pervasive* . . . ." *Meritor Savings Bank*, 477 U.S. at 67. The federal courts of appeals agree that to be "pervasive" there must be repeated and continuous acts of harassment directed to the employee. *e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3rd Cir. 1990); *North v. Madison Area Ass'n for Retarded Citizens*, 844 F.2d 401, 408-09 (7th Cir. 1988); *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1189-90 (2d Cir. 1987). One must look not only to the frequency of the incidents, but also to the gravity of the incidents. *Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d 1503, 1510-11 (11th Cir. 1989).

The only acts alleged were: (1) a single conversation with Petitioner; (2) temporarily reassigning Petitioner to another machine; and (3) throwing a spark plug insulator at Petitioner. These three acts took place within a three-day period.

These acts, although offensive, are insufficient to meet the "severe and pervasive" requirement of a hostile work environment. The record in this case "does not adequately present" the issues asserted. *Ramsey v. New York*, 440 U.S. 444 (1979); *McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971); *see Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969). The questions presented are "purely artificial and hypothetical" and would result in the Court rendering merely an advisory opinion. *Conway v. California Adult Authority*, 396 U.S 107, 110 (1969).

CONCLUSION

The federal circuits have uniformly applied standards for determining liability in sexual harassment cases consistent with the directions of *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986). These standards are consistent with the standards for determining liability in other Title VII cases. There is no conflict among the circuits.

The Petition should also be denied because final judgment has not been entered on Petitioner's Title VII claim, and because this case does not present appropriate facts to address the questions presented.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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